NO. 85,755

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DELYNDA ANN RICKER BARKER REED,
APPELLANT,

V.

PRINCESS ANN RICKER CAMPBELL,
INDIVIDUALLY, AND AS ADMINISTRATRIX
OF THE ESTATE OF PRINCE RUPERT RICKER,
DECEASED,
APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS FOR THE
EIGHTH SUPREME JUDICIAL DISTRICT OF THE
STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER THE BASIS FOR DECISION APPELLEE CONSTITUTES INDEPENDENT AND ADEQUATE STATE GROUNDS?

II. WHETHER APPELLANT PRESENTS A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW?

III. TEXAS STATUTES:

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellee moves the Court to dismiss the appeal herein because (1) Appellant's

petition does not manifest a substantial federal question, and (2) the lower Court's decision and Texas Supreme Court's review was based on adequate and independent state grounds; or in the alternative, to affirm the judgment of the Eighth Supreme Judicial District Court of the State of Texas.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this court under the provisions of 28 U.S.C. 1257(2), or alternatively, as a petition for writ of certiorari pursuant to 28 U.S.C. 2103.

STATEMENT OF THE CASE

Appellant's petition arises from her claim to heirship as an illegitimate child of the Estate of Prince Rupert Ricker, Deceased, asserting entitlement to one-sixth (1/6) of the estate of Prince Ricker, Deceased. Appellant erroneously

believes it is one-seventh (1/7).

I. PLEADINGS AT TRIAL:

Prince Ricker died a judicially declared non compos mentis and intestate on December 22, 1976. Appellant was eighteen years of age. On January 3, 1977, Letters of Administration over the estate were granted to Appellee. Over one year later, on February 16, 1978, Appellant filed a Notice of Heirship and claim for $21,600.00 in past child support. The claim for child support was nonsuited on the day of trial. On June 15, 1978, Appellant filed an independent suit in the 183rd Judicial District Court of Reagan County, Texas, on her claim for child support. And, on February 27, 1979, Appellant filed in the probate proceedings an Application to Determine Heirship, claiming she was a legitimate child of the decedent's estate. On April 20, 1981, all actions were consolidated

and transferred to the 183rd Judicial District Court of Reagan County, Texas for trial.

II. EVIDENCE AT TRIAL:

A hotly contested trial to a jury ensued. At trial, Appellant claimed to be the legitimate child of the deceased by virtue of a marriage on November 24 or 27, 1957 in Juarez Mexico between her mother, Annabel Boutwell, and the deceased Prince Ricker. The purported marriage was void because at the time of the alleged Mexican marriage, Prince Ricker was already lawfully married to Alice Rosemary Lawson. Appellant contended that upon the divorce of Prince Ricker and Alice Rosemary Lawson on February 28, 1958, a common law or putative marriage arose. Evidence at trial produced testimony from Annabel Boutwell that from the time of the purported Mexican marriage

until the end of their relationship, she continued to live with her mother in Big Spring, Texas, and Prince Ricker kept his residence at the Stanton Hotel in Stanton, Texas, where he taught school, and that they would occasionally "live" together on weekends as their work schedules allowed. Annabel Boutwell's maid testified that on some Fridays Prince Ricker would show up at the residence in Big Spring and on some Mondays mornings she would find his laundry. Prince Ricker kept several items such as a typewriter and school annuals at the house in Big Spring and kept some clothes and other personal belongings in Stanton, Texas. J. M. Yater, a teaching colleague of Prince Ricker during the school year 1957-1958, was under the impression Prince Ricker was single.

Prince Ricker told his last wife, Marilyn Watts, in the presence of his

father, that he never married Annabel Boutwell.

Thelma Barham, mother of Alice Rosemary Lawson, lived in Big Spring, Texas, in the late 1950's and 1960's, where she owned a hat shop. At no time did she hear in that small community of any claims by Annabel Boutwell to be the wife of Prince Ricker.

Prince Ricker's sister, Cinderette McDaniel, testified for Appellant that "I knew it was this woman he supposedly had lived with and that she had this daughter that she claimed was his". This is nothing more than hearsay and no evidence. Cindrette McDaniel also testified she had a close relationship with Prince Ricker and they frequently visited in each other's home during the time she lived in Big Spring, Texas from 1956 until 1967. Certainly she should not have

to rely on hearsay.

On October 20, 1958, Prince Ricker lawfully married another woman, Jeri Laverne.

On October 27, 1958, Annabel Boutwell had her name changed to Annabel "Ricker".

On November 1, 1958, Appellant was born. Although Prince Ricker was named as Appellant's father on her birth certificate, Reagan County Memorial Hospital's Director of Nurses, Rose McWilliams testified it is usually the mother that fills out the information in regard to the birth of the child other than the child's sex, weight and time of birth, and that a mother could even put down that Richard Nixon was the father of the child, and the hospital would have no way of ascertaining the facts. She further testified that the fathers are usually not even present when the mothers fill

out the form, that the "informant" is the provider of information and signs his or her name to the birth certificate, and that Annabel Boutwell "Ricker" was the informant. This was no evidence Prince Ricker acquiesced or even had knowledge of her actions.

Annabel Boutwell testified she never attempted to obtain a divorce from Prince Ricker, although she admitted knowing people need to obtain legal documents to get a divorce, although she did go to Court four days before Appellant's birth to change her name to Ricker.

On February 24, 1959, just over three months after Petitioner's birth, Annabel Boutwell married Jerry Barker, who adopted Appellant in 1965.

Appellant relied on the testimony of Armando Mata Martel as evidence supporting Prince Ricker's recognition of Appel-

lant as his child when he allegedly relied on Martel's advice to allow Jerry Barker to adopt Appellant in 1966. However, Martel testified he did not even meet Prince Ricker until 1966 or 1967. Appellant had already been adopted by Jerry Barker, and Prince Ricker was still living with his last wife, Marilyn Watts.

Prince Ricker, Deceased, suffered and died from chronic alcoholism. In 1968, Prince Ricker was judicially declared non compos mentis and the guardianship over his person and estate continued through his death. Prior to the time Prince Ricker was admitted to Hazelden Clinic in 1976, five months prior to this death, 315 pages of medical records from eight different hospitals and mental institutions were admitted into evidence, evidencing Prince Ricker's irreversible alcoholism, dementia, delusions, confabulations, Korsakoff's psychoses, memory

delusions, hallucinations, psychotic reactions and peripheral neuropathy due to degeneration and atrophy of the brain cells as a result of seizures and toxic effects of alcohol.

As to Appellant's assertion in her Jurisdictional Statement (p.7 footnote) that Prince Ricker "admitted only that he could have been Delynda's father", Appellee says that the evidence was that five months prior to his death, Prince Ricker was discharged from Hazelden Clinic and flown by his sister and her husband, Cindrette and Reginald McDaniel, to their home in Dallas, Texas, where he stayed a few days before returning to his permanent abode at the La Posta Motor Lodge in El Paso, Texas. In the rehabilitative book furnished by Hazelden Clinic, Prince Ricker wrote "Number 2, I was the father, reasonably sure, of a daughter out of

wedlock. I justified it in the usual manner. She put it in the newspaper. I was conning Dad. There was an easier way." Cindrette McDaniel then said "You mean Annabel". Reginald McDaniel testified of the conversation "my wife was running the conversation". At the time of the alleged converstion five months before Prince Ricker's death, Reginald McDaniel testified Prince Ricker would peek into the booklet and then hide it, which is a part of Korsakoff's syndrome, and these actions did not suprise Dr. McDaniel. Further, as early as 1965, Prince Ricker's eyesight had deteriorated to a point he could not even read without using a magnifying glass.

After the death of Prince Ricker, his sister, Cindrette McDaniel, filed a Sworn Affidavit of Heirship in the Deed Records of Reagan County, Texas stating Prince Ricker had been married three

times during his life; to Rosemary Lawson, of which two children were born being Princess Ann Ricker and Rosemary Jane Ricker; to Jeri Laverne; and, the Marilyn Salt (Watts) of which three children were born, being Prince Ricker, Jr., Brett Drayton Ricker and Mark Ricker. The affidavit also states Prince Ricker had no deceased children and had "never adopted any children or cared for any children . . . other than the natural children named above."

In contradiction to Annabel Boutwell's testimony that she last saw Prince Ricker in 1968 or 1967 when he got out of the Big Spring State Hospital, and who had seen him only once prior to that time in 1959 or 1960, Herb Gehring, the manager of the La Posta Motor Lodge in El Paso, Texas, testified Annabel Boutwell and Appellant visited Prince Ricker in

the Spring of 1976 and stayed two or three days. After their first visit, Gehring noticed Appellant and her mother left a small photograph of Appellant stuck in the mirror of Prince Ricker's room. He also testified that during this time Prince Ricker was delusional and unable to care for himself.

A chronology of pertinent dates is set forth in Appendix A herein.

III. JURY FINDINGS:

The jury, in answer to special issues, found by a preponderance of the evidence that (1) Appellant was the child of Prince Ricker, Deceased; (2) that the deceased and Annabel Boutwell, Appellant's mother, entered into a ceremonial marriage on November 24 or 27, 1957; (3) that on November 24 or 27, 1957, the deceased and Annabel Boutwell agreed to be husband and wife; (4) that the deceased and Annabel Boutwell did not live toge-

ther as husband and wife on or after November 24 or 27, 1957 until June 1958; (5) that the deceased and Annabel Boutwell did not hold themselves out to the public as husband and wife until June 1958; and (6) that asked whether on November 24 or 27, 1957, Annabel Boutwell believed the deceased to be unmarried, the jury answered "she believed he was married".

IV. HOLDINGS OF THE COURTS BELOW:

The Trial Court properly held Appellant to be illegitimate and incapable of inheriting from the intestate estate of Prince Ricker, Deceased.

From the Judgment of the Trial Court, Appellant perfected appeal to the Court of Appeals for the Eighth Supreme Judicial District of Texas. That Court correctly affirmed the judgment of the Trial Court in holding that the purported

1957 Mexican marriage between Appellant's mother, Annabel Boutwell, and Prince Ricker, which was void since Prince Ricker was still validly married to his first wife, Alice Rosemary Lawson, did not thereafter ripen into a common law or putative marriage after the divorce of Prince Ricker, Deceased and Alice Rosemary Lawson on February 28, 1958, because the jury's answers, supported by sufficient evidence, failed to find the elements of either a common law or putative marriage.

The Court of Appeals further correctly held that Appellant was not entitled to inherit from the Estate of Prince Ricker as a "recognized" illegitimate since there were positive occurrences of nonrecognition, the Appellant failed to request an issue on recognition, and that Section 42(b) of the Texas Probate Code provides the only methods of

which an illegitimate child can inherit from her father.

The Court of Appeals went on to hold that no denial of equal protection under the State and Federal Constitutions was wrought on Appellant and under the rule of Winn v. Lackey, 618 S.W.2d 910 (Tex.-Civ.App.--Eastland 1981, no writ), the equal protection argument of Appellant failed because Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977) has not been applied retroactively, and even if Appellant could claim under the existing amended version of Section 42(b), her exclusion under that statute does not deny her equal protection, as a rational state basis supports that legislation.

Rehearing by the Court of Appeals was denied without opinion on January 23, 1985.

The Texas Supreme Court refused discretionary review with the notation "no reversible error" on June 5, 1985, and overruled Petitioner - Appellant's Amended Motion for Rehearing of her Application for Writ of Error on July 17, 1985.

ARGUMENT AND AUTHORITIES

Appellant seeks to convince the Court that at the time Prince Ricker died on December 22, 1976, insufficient statutory and constitutional opportunity was afforded Appellant in which to establish herself as a "legitimated" child and make herself capable of inheriting from the Estate of Prince Ricker, Deceased. Appellee believes sufficient non-federal bases exist for dismissal of Appellant's appeal or denial of her petition.

Appellee would show to the Court that the 1955 version of Section 42 of the Texas Probate Code, V.A.C.S. has been amended twice since the death of Price Ricker, in 1977 and 1979. As to which version Appellant is requesting this Court to hold unconstitutional is questioned by Appellee herein. For Appellant to ask this honorable Court to strike

down the 1955 and 1977 versions of Section 42 of the Texas Probate Code would invade the long established doctrine of mootness. A reading of Appellant's jurisdictional Statement makes it hard to determine which versions of Section 42 Appellant is claiming to be unconstitutional. Apparently, Section 37 and the pre-1979 versions of Section 42 of the Texas Probate Code are under attack, as Appellant claims entitlement "to any relief which she would have been entitled to if the current Section 42 had been in effect when her father died". (Jurisdictional Statement, p. 47) Appellee states that, as properly held by the honorable Texas Court of Appeals in this case,

> "Even if Plaintiff (Appellant) could claim under Section 42(b) as amended, her exclusion from the inheritance under that statute does not deny her constitutional equal protection since a rational

> state basis supports that legislation. Davis v. Jones, 626 S.W.2d 303 (Tex. 1982); Mills v. Edwards, supra."

Reed v. Campbell, 682 S.W.2d 697 (Tex.-Civ.App.--El Paso 1984, ref'd, n.r.e.) When Prince Ricker died intestate on December 22, 1976, Section 42 of the Texas Probate Code stated as follows:

> "For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants and collaterals in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property, and the making of any family allowances. Where a man, having by a woman a child or children shall afterwards intermarry with

> such a woman, such child or children shall thereby be legitimated and made capable of inheriting his estate. The issue of marriages deemed null in law shall nevertheless be legitimate."

Winn v. Lackey, 618 S.W.2d 910 (Tex.Civ.-App.--Eastland 1981, no writ)

On April 26, 1977, this Court decided the case of Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977). The decision was five to four. At question was the constitutionality of an Illinois Probate Act statute which distinguished between legitimate and illegitimate children, under which illegitimate children were allowed to inherit only from their mothers by intestate succession, while legitimates were allowed to inherit not only from their mothers by intestate succession, but also were allowed to inherit from both their mothers and fathers. The Illinois statute re-

quired marriage and formal acknowledgment by the father, whereas the Texas statute required only marriage. This Court held the Illinois statute violated the equal protection clause of the Fourteenth Amendment to the United States Constitution because such discrimination did not bear a reasonable relation to legitimate legislative aims.

In 1971 in Texas, the constitutionality of Sections 3(b) and 42 of the Texas Probate Code were examined in Wells v. Hames, 464 S.W.2d 393 (Tex.Civ.App.--Hou.[14th Dist.] 1971, ref'd, n.r.e. That Texas Court of Civil Appeals held Appellants were unable to show themselves entitled to inherit from the deceased because they had not shown their mother and purported father had ever been married and that the above statutes were "rational and valid and that the classification involved is both rational and rea-

sonable".

In 1978, the Tyler Court of Civil Appeals examined the constitutionality of Section 42 of the Texas Probate Code prior to its 1977 and 1979 amendments in Lovejoy v. Lillie, 569 S.W.2d 501 (Tex.-Civ.App.--Tyler 1978, ref'd, n.r.e.), and held Section 42, as it existed prior to the 1977 and 1979 amendments, was unconstitutional because it did not bear a reasonable relation to legitimate legislative aims, to the extent it conflicted with the recent decision in Trimble v. Gordon, supra.

However, neither the Trimble case, supra, nor the Lovejoy case, supra, determined whether or not Trimble would be applied retroactively.

The precise question of whether or not Trimble v. Gordon, supra, would be applied retroactively was decided by the

Eastland Court of Civil Appeals in the case of Winn v. Lackey, supra, which this Appellee states is dispositive of the case at bar as a matter of law, as was found by the Court of Appeals' opinion in the case at bar.

In Winn v. Lackey, supra, Virgil Winn died intestate and unmarried on April 6, 1973. On January 26, 1978, Wilder Winn, Individually and as Guardian of the Estate of his incompetent brother brought suit against his two surviving brothers seeking a partition of certain lands in Stonewall County, Texas, which the brothers had inherited from their mother. In the petition, Wilder Winn alleged that his predeceased brother, Virgil, died intestate on April 6, 1973, was unmarried at the time of his death, and had no children.

Thereafter, on May 9, 1978, after the decision in Trimble, supra, an inter-

vention was filed in the suit by the Guardian of the Estate of Julie Marie York, a minor born July 12, 1969, alleging that this child was the sole surviving heir at law of Virgil Winn and claiming an interest in the lands in question.

The Trial Court held that this minor child owned a thirty percent interest in and to said lands. The Winn brothers appealed. On appeal, the Court of Civil Appeals reversed and rendered that portion of the judgment awarding the minor illegitimate child an interest in the lands and held the Winn brothers were the owners of one hundred percent of the lands.

The issue facing the Court in Winn, as in the case at bar, is whether the rule announced in Trimble v. Gordon, supra, should be applied retroactively to

the extent that an illegitimate child, who filed suit after Trimble, could inherit from her father who died intestate prior to Trimble.

Appellee urges that Winn v. Lackey, supra, is in point with the issue at bar. In Winn, Virgil Winn died intestate on April 6, 1973, prior to Trimble, as in the case at bar. Suit was not filed in Winn until after Trimble, supra, was decided, as in the case at bar.

The Court in Winn reviewed the cases of other jurisdictions confronted with the question of whether or not Trimble, supra, should be applied retroactively, as was being urged by the Guardian of the illegitimate child. Further, the Court stated:

> "The Supreme Court in Trimble did not discuss the issue of whether the decision should be given retroactive or prospective application. We therefore may determine the proper

application of the rule. 10 A.L.R.3d 1371, Sec.5 at 1389-1392, Sec.8 at 1397-1412."

The Court held that where the intestate father died before Trimble, but the illegitimate child's suit was not filed until after April 26, 1977, the day Trimble was decided, then Trimble would not be applied retroactively, one of the reasons being to do so would cause chaotic title conditions.

Petitioner in this case is attempting to establish herself as an heir at law to the Estate of Prince Ricker, which is comprised primarily of interests in real property. Winn also dealt with a purported illegitimate child's interest in real property, and the orderly administration of the estate. Winn is in point with the case at bar, and under the authority of Winn, the Trimble case should not be applied retroatively, as held by

the honorable Court of Appeals in this case.

In upholding the constitutionality of the 1977 amendments to Section 42 of the Texas Probate Code, the Texas Supreme Court discussed in detail the U.S. Supreme Court cases concerning the constitutionality of several state probate statutes dealing with inheritance rights of illegitimate children in Davis v. Jones, 626 S.W.2d 303 (Tex. 1982) The Davis opinion notes that the U.S. Supreme Court was sharply divided five to four, with many opinions in each case, and that the "facts of the three Supreme Court cases appeared to play a major role in the decisions".

In Labine v. Vincent, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017 (1971), this Court, five to four, upheld the constitutionality of a Lousiana statute which provided that "illegitimate child-

ren, though duly acknowledged, cannot claim the rights of the legitimate child", under facts where the intestate father and mother of the child had appeared before a state agency and the father formally acknowledged the child as his. This Court found a rational and important state interest in upholding the statute's constitutionality.

The next case that dealt with the question was Trimble v. Gordon (1977), supra, which was also decided five to four. The Texas Supreme Court noted that "the Illinois statute authorized inheritance if the parents married and [not or] the father acknowledged that the child was his," and an Illinois court had previously entered a paternity order requiring the father pay child support for his illegitimate daughter. This Court held that the Illinois statute requiring mar-

riage and acknowledgement created an "insurmountable" barrier and there was no rational basis for the statute, constituting invidious discrimination and violation of the equal protection clause.

The next case to come before this Court and discussed by the Texas Supreme Court in Davis v. Jones, supra, was Lalli v. Lalli, 439 U.S. 259, 58 L.Ed.2d 503, 99 S.Ct. 518 (1978). This was also decided five to four. At question was the constitutionality of a New York statute which required, in the absence of a marriage, a court order of paternity in a proceeding begun during the mother's pregnancy or within two years after the child's birth. In this case, there was no marriage, no will and no paternity order, although the father did execute a formal consent to marriage for the child, referring to the child as "my son". However, this Court held that the formally

executed consent to marry did not constitute a formal acknowledgment of the child, and distinguished Trimble because Illinois required both formal recognition and marriage. This Court upheld the constitutionality of the New York statute, and held that the statute's evidentiary requirement of having paternity judicially declared before the father's death was directed to the State's primary goal of providing for the just and orderly disposition of property on death and exposure to spurious claims even though the statute might be unfair to some illegitimates who would otherwise be able to establish their relationship without disruption of the administration of estates.

In the case at bar, Section 42 of the Texas Probate Code, prior to the 1977 and 1979 amendments, only required a marriage of the father and the mother, and

did not require a formal recognition. It was less stringent than the statute confronted by the Court in Trimble, supra, and the case at bar should be governed by the reasoning in the Lalli case, supra, rather than Trimble, supra. Further, Trimble should not be applied retroactively as was held in Winn, supra, and Appellant should not be entitled to inherit from the Estate of Prince Ricker.

Further, this suit was brought by Appellant following the enactment of the 1977 amendment to Section 42 of the Texas Probate Code. The Texas Supreme Court in Davis v. Jones, supra, dealt with a complex situation as to whether an illegitimate daughter, Kathryn Jones, and an illegitimate grandson, Craig Faultry, "in the absence of a will", could inherit from the father and the grandfather respectively. Both were trying to inherit from the estate of Warren Davis, Sr.

(father-grandfather) who died in 1978. Kathryn Jones claimed to be the illegitimate daughter of Warren Sr. by a woman never married to Warren Sr., Ruth Lockett. Craig Faultry claimed to be the illegitimate son of Warren Jr. and the grandson of Warren Sr. and his lawful wife, Marie Davis. Warren Jr. never married and died in 1960, one month prior to Craig Faultry's birth.

In connection with the claim of the grandson, Craig Faultry, the Texas Supreme Court said:

> Craig Faultry goes through the step of legitimation by his father. His claim is against the estate of his grandfather. The mother of Craig Faultry is not identified in the record. The state has provided no method, other than adoption, for legitimating grandchildren, great granchildren, or great great grandchildren. And, at the time of the death of his father in 1960, there were not

> "suitable alternatives" under Trimble. This does not lead us, however, to declaring the 1977 Texas statute unconstitutional, - the statute in force when the suit was brought. [emphasis ours]

Thus, should Appellant be entitled to claim under Section 42(b) of the Texas Probate Code, pursuant to its amendments, this Supreme Court in Davis v. Jones, supra, refused to hold the 1977 statute unconstitutional and found a rational state interest to support the legislation.

The Texas Court of Appeals decision in Winn v. Lackey, supra, properly held that Trimble v. Gordon, supra, should not be applied retroactively. The State of Texas has a valid important primary goal of providing for the just and orderly disposition of property on death, safeguarding the dependability of real property titles passing under intestacy statutes and safeguarding against spurious

claims. This Court has recognized that "this is an area with which the states have an interest of considerable magnitude". Lalli v. Lalli, supra.

Regarding Petitioner's argument that because she was born prior to September 1, 1975, the effective date of Chapter 13 of the Texas Family Code, V.A.C.S., she had no remedy was precisely one of the Appellant's arguments in the case of Wynn v. Wynn, 587 S.W.2d 790 (Tex.Civ.App.--Corpus Christi 1979, no writ). The Court in Wynn, supra, said "This argument virtually ignores the United States Supreme Court decision of Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973) and every other involuntary paternity suit brought for establishing the paternity of children born prior to September 1, 1975, in Texas after that decision". The Wynn Court went onto hold, as was recognized by this Supreme Court,

that illegitimate children had a common law right to sue to establish paternity "as a necessary requisite to establish ' a judicially enforceable right' otherwise accorded to legitimate children generally". Gomez v. Perez, supra, as early as 1973 held that denial, under Texas law, of an illegitimate child's common law right to support from its natural father violated the equal protection clause of the Fourteenth Amendment.

Appellant further argues that she has not had a sufficient time or sufficient remedy in which to establish the paternity of Prince Ricker, since the versions of Section 13.01 of the Texas Family Code prior to 1983 never gave her sufficient time from birth to sue for paternity. In rebuttal, however, Appellee would state that Petitioner's suit against the Estate of Prince Ricker is

also barred by the general four year statute of limitations, Article 5529, V.A.C.S.

It has been held that the 1975 amendment to Chapter 13 of the Texas Family Code, Article 13.01 V.A.C.S., which stated that a suit to establish paternity must be brought before the child is one year old is not to be applied retroactively, and was also held unconstitutional in Mills v. Habluetzel, 456 U.S. 91, 71 L.Ed.2d 770, 102 S.Ct. 1549, (1982). Alvarado v. Gonzales, 552 S.W.2d 539 (Tex.Civ.App.--Corpus Christi 1977, no writ); Texas Department of Human Resources v. Delley, 581 S.W.2d 519 (Tex.-Civ.App.--Dallas 1979, ref'd, n.r.e.)

The Courts dealt with the problem of what the appropriate statute of litmitations is applicable in paternity suits where the illegitimate child was born prior to the effective date of the sta-

tute (13.01), September 1, 1975, in the Delley case, supra. The Court of Civil Appeals held that since no specific statute of limitations was designated for paternity suits for children born before September 1, 1975, the general four year statute of limitations applied and that Article 5535, V.A.C.S., which tolls limitations during minority and disability, applies in those cases of children born before September 1, 1975.

Appellee says that even if the statute is tolled during Appellant's minority, she should have filed a paternity suit on or before November 1, 1980, which date is four years after the removal of her disability. Because Appellant failed in every respect to sue to establish paternity, such cause is barred.

Should the Court consider Appellant's argument that she should be enti-

tled to any benefits of the 1979 amendment to Section 42(b) of the Texas Probate Code, setting forth procedures for legitimation as a prerequisite to inheritance. Appellee says that Appellant failed in every respect to do any act to entitle her to such benefits. That statute provides four ways for an illegitimate child to prove entitlement to inheritance. First, the child must be born or conceived during the marriage of the father and mother; or second, the child is legitimated by court decree as provided by chapter 13 of the Texas Family Code; or third, the father has executed a statement of paternity as provided by Section 13.22 of the Texas Family Code; or fourth, the father has properly executed a like statement of paternity in another jurisdiction. Each element is mutually exclusive.

Appellant was born November 1, 1958. Under the laws of nature and undisputed herein, Appellant was not conceived until late January or early February, 1958, a time during which Prince Ricker was legally married to his first wife, Alice Rosemary Lawson. And, at the time of Appellant's birth, Prince Ricker was lawfully married to another woman, Jeri Laverne, not Appellant's mother. Thus, Appellant was not born or conceived during any claimed marriage between Annabel Boutwell and Prince Ricker.

No suit for paternity was ever instituted by Annabel Boutwell in the eighteen years Prince Ricker lived before Appellant's majority. Appellant never filed a suit to establish the paternity of Prince Ricker. Her claim for child support and Notice of Heirship filed in the instant case cannot be said to have been a suit to establish the parent-child

relationship as contemplated by Chapter 13, Sections 13.01 through 13.09 of the Texas Family Code. Further, she non-suited her claim for child support before the day of trial.

And, it is undisputed that Prince Ricker never executed a statement of paternity in Texas or any other jurisdiction pursuant to Section 13.22 of the Texas Family Code.

Thus, Appellant has failed in every respect to do one thing to establish herself as a legitimated child for inheritance under Section 42 of the Texas Probate Code, as amended.

Regarding Appellant's apparent contention that Section 37 of the Texas Probate Code is unconstitutional, Appellee says that in all her briefs filed in this case, this is the first forum in which this statute was ever cited. Appellee

urges the Court to dismiss Appellant's attack on such statute. Certainly the State of Texas has an important state interest in providing a certain time for the vesting of judicially enforceable rights, enabling an intestate or testator to know with certainty prior to death how and when his estate will devolve, and enabling devisees, heirs, and creditors to know with certainty when such judicially enforceable rights shall vest. Texas Probate Code, Section 37. Such important state interests outweigh Appellant's contention it operates to effectuate the 1955 version of Section 42 of the Texas Probate Code and throw up an insurmountable constitutional barrier.

Further, Appellee urges that no necessity exists for this Court to decide the question of whether Trimble v. Gordon, supra, should be applied retroactively in the case at bar. Whether

this Court determines that Appellant is unconstitutionally denied equal protection as an illegitimate child pursuant to the 1955 and 1977 versions of the Texas Probate Code, the Texas Court of Appeals decision in this case held:

> "Even if the Plaintiff (Appellant) could claim under Section 42(b) as amended, her exclusion from the inheritance does not deny her constitutional equal protection since a rational state basis supports that legislation. Davis v. Jones, 626 S.W.2d 303 (Tex. 1982); Mills v. Edwards, supra." [emphasis ours]

The issue has been decided by the Texas state court on adequate non-federal bases. No attack on Probate Code, Section 42, as amended is made, and no infringement of Appellant's constitutional right to equal protection has been wrought. No substantial federal question exists. For these reasons, this appeal

should be dismissed, or alternatively the decision of the honorable Texas Court of Appeals decision herein should be affirmed.

The State of Texas through its legislative powers has set forth methods by which an illegitimate child may be legitimated for purposes of inheritance from the estate of its father. This Court has long recognized and given broad discretion to states in its important state interest of providing for "the stability of definitive determination of the valid ownership of property left by decedents". Labine v. Vincent, supra; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 31 L.Ed.2d 768, 776, 92 S.Ct. 1400 (1972); Lalli v. Lalli, supra. These cases further recognize the rare problems involved in establishing the child's relation to the mother but the frequent numerous pro-

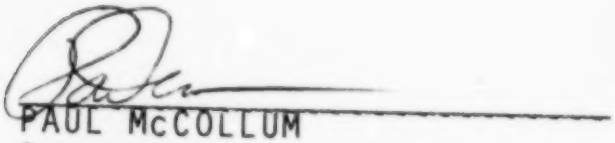
blems in establishing the paternity of the putative father. Lalli v. Lalli, supra, addressed this problem in detail and found substantial state interests in treating mothers and putative fathers differently in the state's furtherance of its goals in the timely and orderly disposition of estates and the protection of estates from spurious claims of heirship. Such classifications are constitutional and no denial of equal protection has been visited upon Appellant.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the decision below rests on adequate state grounds. Appellee respectfully moves the Court to dismiss this appeal and petition, or in the alternative, to affirm the judgment entered in the cause by the Court of Appeals for the Eighth Supreme Judicial District of

Texas on the basis that no substantial federal question has been presented by Appellant.

Respectfully submitted,



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Appellee
and
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AFFIDAVIT OF MAILING

STATE OF TEXAS)
)
COUNTY OF ECTOR)

BEFORE ME, the undersigned authority, on this day personally appeared PAUL McCOLLUM, who, having been by me first duly sworn, upon his oath deposes and says that he is a member of the Bar of this Court; that he is attorney of record for Appellee herein; that he received Appellant's Jurisdictional Statement on October 17, 1985; that forty (40) copies of Appellee's Motion to Dismiss or Affirm were deposited in the United States mail at Odessa, Ector County, Texas, with first-class postage prepaid, properly addressed to the Clerk of the U. S. Supreme Court; and, that to my knowledge the mailing took place on the 16th day of November, 1985, within the time permitted for filing said Motion to Dismiss or Af-

firm, pursuant to Rule 28.2, Supreme Court Rules.

Three (3) copies each of the Motion to Dismiss or Affirm were deposited in the United States mail at Odessa, Ector County, Texas, first class postage prepaid, properly addressed to the following:

Mr. R. Stephen McNally
Counsel of Record
for Appellant
P.O. Box 1586
Austin, Texas 78767-1586

Mr. Jim Mattox
Attorney General of the
State of Texas
Capitol Station
P.O. Box 12548
Austin, Texas 78711

I further state that to my knowledge the mailing took place on November 16, 1985, within the permitted time.

I have read the above and the matters set forth therein are to my knowledge true and correct.

PAUL McCOLLUM
ATTORNEY OF RECORD FOR
APPELLEE

SUBSCRIBED AND SWORN TO before me on this the 16th day of November, 1985.

Notary Public for the
State of Texas